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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JASON WOLCHIN, Plaintiff and Appellant, v. JULIE B. KAPLAN, AS EXECUTOR OF THE ESTATE OF RICHARD LAWRENCE KAPLAN, Defendant and Respondent.	B287029 (Los Angeles County Super. Ct. No. BC609486

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Judge. Affirmed.

The Dodell Law Corporation, Herbert Dodell and Perry R. Fredgant for Plaintiff and Appellant.

Vogt, Resnick & Sherak, Stephan H. Andranian for Defendant and Respondent.

INTRODUCTION

In the 1980's to early 1990's, Jason Wolchin and his former business partner, Richard Lawrence Kaplan, owned a recording studio, Studio II Recording, Inc. Following a flood resulting in extensive water damage to the studio and its equipment, Studio II closed in 1993 and the recording equipment was moved to Kaplan's other recording studio, Indigo Ranch. Indigo Ranch closed in 2006 or 2007. After Kaplan's death in 2014, Wolchin sued Kaplan's estate for the value of the Studio II equipment that had been moved to Indigo Ranch. Asserting breach of contract and related causes of action, Wolchin alleged that Kaplan sold some of Studio II's equipment in 2007, and Wolchin was entitled to half of the sales proceeds. He also alleged he was entitled to half of the current value of Studio II's equipment that was still in the possession of the Kaplan estate.

After a bench trial in which the parties and court struggled to track hundreds of pieces of recording equipment over more than two decades, the court found that Wolchin failed to present sufficient evidence to support his claim for damages. The court entered judgment for the estate.

We affirm. The evidence did not compel a finding in favor of Wolchin on his claim that he was entitled to half of the value of the equipment sold 14 years after Studio II closed (some of which had apparently appreciated considerably), and half of the current value of the remaining equipment. In the agreement to wind down Studio II, Wolchin and Kaplan agreed to split the proceeds from the corporate assets after "costs of disposition," and although no evidence was presented about such costs, the evidence supported an inference that costs were incurred. We

also find that the evidence did not compel a finding for Wolchin on his claim for an accounting against the estate.

FACTUAL AND PROCEDURAL BACKGROUND

Wolchin alleged four causes of action against Kaplan's estate[1]: breach of written contract, accounting, money had and received, and fraud. The case proceeded to a bench trial.

The record reveals a case that is disjointed, confusing, and often contradictory. The parties presented evidence to the court on May 30, June 1, June 8, June 23, and June 29, with closing arguments and additional proceedings on August 23 and September 29, 2017. No court reporter was present on the first two days of trial. Wolchin claimed an interest in hundreds of individual pieces of recording equipment, which, between 1993 and 2014, had been commingled with hundreds of other pieces of recording equipment. When the trial began, the parties did not know what equipment had been sold or what equipment remained at the Kaplan residence. The court understandably struggled to grasp the parties' positions in light of the fragmented state of the evidence. Wolchin contends on appeal that the trial court's decision was not supported by the evidence.

Thus, our lengthy recitation of the evidence below comes with the caveat that we recognize that it is not always easy to follow, the parties' positions change throughout, and the numbers do not always add up. We, like the trial court, have done our best with the information presented.

A. Wolchin's case

Wolchin testified that he and Kaplan formed Studio II Recording, Inc. as equal owners. Studio II was a fully equipped

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[1] The second amended complaint was operative at the time of trial.

recording studio that handled overflow requests from Kaplan's other recording studio, Indigo Ranch. Studio II was in business from 1982 to 1993. Wolchin testified that his cash investment in the recording equipment for Studio II was less than $100,000.

An inventory list of Studio II's equipment in 1985 was admitted as trial exhibit 2. The list is on Studio II letterhead, and is titled "1985 Inventory List." It is 11 pages long and lists equipment including amplifiers, microphones, headphones, speakers, and cables; some equipment includes serial numbers. Also admitted at trial was exhibit 3, an excerpt from an advertising section of Mix magazine from September 1987. It displays a listing for Studio II, and includes lists of equipment, such as mixing consoles, audio recorders, microphones, and amplifiers.[2] Exhibit 4 is a two-page document on Studio II letterhead. It states the studio dimensions, and lists equipment such as a mixing console, audio recorders, amplifiers, speakers, musical instruments, and microphones. Exhibit 4 does not contain equipment serial numbers, and the exhibit appears to be undated.[3] The court's settled statement summarizing part of Wolchin's testimony states, "Trial Exhibits 3 and 4 were lists to advertise what recording equipment Studio II had available; that included equipment owned by Indigo Ranch."[4]

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[2]The copy of exhibit 3 included in the record on appeal is extremely grainy and illegible in many places.

[3]In questioning witnesses and in briefing, Wolchin's counsel represents that exhibit 4 was created in 1989.

[4]The parties disagreed at trial about which equipment belonged to Indigo Ranch and which belonged to Studio II. Because that point of contention is not relevant to Wolchin's claims on appeal, we do not discuss that evidence here.

In late December 1992, Studio II suffered water damage from a broken pipe. Wolchin was working in another state at the time, and Kaplan alone prepared an insurance claim for the resulting damage to studio equipment and for loss of business. Kaplan hired Chris Brunt to assess the equipment and prepare documentation in support of the insurance claim.

Trial exhibit 109 consisted partly of a written damage assessment Brunt prepared for the insurance company. Brunt, writing as his company, Chris Brunt Engineering, stated that he was familiar with the equipment at Studio II because his company had been "responsible for the modification and maintenance of the specialized audio equipment at Studio II for over 10 years." He stated that the "mixing console and tape machines at Studio II receive, on average, 2 major overhauls each year," involving "primarily preventative maintenance." Following the flood, there was "a moisture film over every circuit board." Microphone and "buss-select switches" "showed a considerable degradation in contact integrity." "After consultation with the owner it was decided that an attempt be made to turn on the mixing console to further determine damage. After turn on it was immediately obvious that a major malfunction occurred."

As for other equipment in Studio II, Brunt stated in his report that an inspection of speakers "revealed paper cones that were wet to the touch," and visible oxidation "within the horn units." "Upon opening a rare tube microphone (Telefunken 251) the inside was moist and smelled of mold formation. These microphones had been maintained in a state of meticulous cleanliness." Another type of microphone "was similarly inspected and revealed the same findings." In addition, the

studio's "[c]able trays still contained about 1/2 inch of water," and "moisture had already begun to 'wick' into cable ends."

Brunt wrote that "[m]uch of the equipment at Studio II is relatively old and consequently fragile. This equipment is of a type highly sought and prized by most audio (Hi-fi) specialists." Under a heading for "recommendations," Brunt wrote that "full restoration of all concerned equipment to an acceptable standard of performance and GUARANTEED reliability can only be accomplished as detailed below. [¶] All equipment will require dis-assembly to at least board level. Much attention will be required for connectors, pots, switches, and faders. . . ." The recommendations continued with further details. It is unclear if the recommendations for repair applied only to the console and related equipment, or if they encompassed other damaged equipment.

Brunt's report also included a page detailing his "estimate of board restoration cost." It included time estimates for disassembly of various parts, cleaning, re-wiring, and reassembly. It also included a cost estimate for parts needed, and a notation that "[f]inalized costs are likely to be higher due to unforeseen circumstances and damage." The total estimated cost printed on the page is $91,399. Various handwritten notations show higher estimates than the printed ones, and "150,000" is written near the printed total estimated cost.

Exhibit 109 also included a list of damaged equipment from Studio II. The parties and court called it the "Greenspan list," because Greenspan was the name of the insurance adjustor. The Greenspan list included columns for descriptions of each piece of equipment, a replacement/new value, and an actual cash loss value. Certain items were marked "TL," indicating a total loss.

Witness Bart Johnson, who had worked with Kaplan, testified that the Greenspan list was "a thorough list and [Brunt] had fairly priced the damaged equipment." The information on the Greenspan list is handwritten, it bears a fax stamp from 1993, and parts of it are illegible on the grainy copy included in the record on appeal.

Wolchin testified that the insurance company paid the claim, but he did not remember the amount paid. The insurance company obtained title to the damaged recording equipment as part of the claim, and Kaplan and Wolchin used part of the insurance payment to buy back the damaged equipment. No evidence was presented as to the amount of the buy-back.

All of Studio II's equipment was moved to Indigo Ranch in 1993; no documentation or inventory of equipment was prepared. On July 22, 1993, Wolchin and Kaplan signed an agreement that states in full, "It is agreed between Richard Kaplan and Jason Wolchin they will jointly dispose of any corporate assets after the liquidation of Studio II Recording Inc. The proceeds will be divided equally after the cost of disposition." This is the contract Wolchin alleges was breached.

Wolchin testified that after Studio II closed in 1993, he spoke to Kaplan from time to time about the Studio II equipment. Kaplan told him the equipment was still at Indigo Ranch, and it was increasing in value. Wolchin testified that he visited Indigo Ranch in 2005 and saw some Studio II equipment in use. Wolchin also testified that in July 2010, Kaplan told him he was using some of Studio II's equipment in digitizing Bing Crosby recordings.

Kaplan died in November 2014. Wolchin testified that he learned after Kaplan's death that Kaplan had sold some of the

Studio II equipment. Wolchin testified about exhibit 11, which the court described in its settled statement as "a 33-page listing of recording equipment." Throughout trial, the parties and court agreed that part of exhibit 11 demonstrated the sale of certain equipment from Indigo Ranch to Sonic Circus, a recording equipment retailer, in 2007.[5] The exhibit is a detailed spreadsheet with columns for equipment categories (e.g., amplifiers, consoles, dynamics, microphones); the name of each piece of equipment; a description of the equipment; quantity; "Total Amount," which lists dollar amounts; and "quantity received." More than 1000 pieces of equipment are listed.

On the first 15 and a half pages of exhibit 11, the "quantity received" column lists all zeroes. Page 15 includes a line stating, "Subtotal itemized nonreceived items: $277,148.00." During the trial, the parties agreed that the items listed as non-received were not sold to Sonic Circus.[6]

From the bottom half of page 15 though page 33 of exhibit 11, the "quantity received" column has numbers greater than zero. Page 33 lists "Total received items" and "$480,336.00." Page 33 also contains a list titled "payment history," six dates from January to September 2007 with payment amounts, and a line stating, "Total payments: $656,000.00." Thus, it appears that Sonic Circus purchased the items listed on pages 15 to 33,

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[5]The origins of exhibit 11 were not clear. After trial, the court and counsel for both parties stated that they did not know whether exhibit 11 was created by Indigo Ranch to facilitate the sale of the equipment, or if it was created by Sonic Circus in the process of the sale.

[6]Wolchin's various requests for damages nonetheless included the listed "total amount" figures for this non-received equipment.

for a total of $656,000. The discrepancy between the "total received items" amount of $480,336 and the payment amount of $656,000 was never explained at trial.

Wolchin submitted exhibit 25, "LIST OF SOLD ITEMS to Sonic Circus," which apparently represents the damages Wolchin was claiming by specifying which items from exhibit 11 originally belonged to Studio II. According to the court's settled statement, "Wolchin prepared Trial Exhibit 25 based on various lists he reviewed." Exhibit 25, which is seven pages long, lists item names and descriptions, quantity, and dollar amounts. The last page states, "There are still equipment [*sic*] that is not on this list." It also states, "Grand total: $362,100.00."

The court's settled statement says witness Chuck Johnson[7] testified; it is unclear which party called him. Chuck Johnson worked at Indigo Ranch from 1978 to 1999, and again in 2001. He testified that the recording equipment listed in exhibit 2 (the 1985 Studio II inventory list), exhibit 3 (the 1987 Mix magazine listing), and exhibit 4 (the undated 2-page list of equipment) was available at Studio II.

Wolchin called witness Raquel Archangel, who had known Wolchin since 1981 and was his partner at a tile business. Archangel testified that she heard Kaplan tell Wolchin that he was "reworking some Bing Crosby records," and using Studio II equipment in the process. Wolchin also called as a witness Julie Kaplan (Julie), Kaplan's wife and executor of Kaplan's estate. We discuss Julie's testimony below.

Wolchin also called witness Michael Schuman, who testified that that he "did a lot of work at Studio II" from 1983 or

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[7]This witness is also referred to as Charles David Johnson in the record.

1984 to the early 1990's. Schuman said he liked working at Studio II, in part because "[t]hey maintained the equipment really well." Schuman testified that the 1985 inventory list did not appear to list all of the equipment at Studio II. He also said that much of the equipment listed in exhibit 11 appeared to belong to Studio II, based on his impression when he was last there in 1991. Wolchin rested.

B. Discussion of the parties' positions

At the end of the third day of trial, June 8, 2018, after Wolchin had rested, the court and parties discussed the parties' positions and additional evidence to be presented. Counsel for the estate stated that evidence would show that Kaplan was a "tinker" and would have tried to either "revive" the damaged equipment or use it for parts. The court stated, "So he fixed it." Counsel for the estate responded, "[A]pparently some of the equipment was fixed."

The court stated that the insurance company's payment for the damaged equipment "would suggest that" the value of the equipment had depreciated significantly due to the water damage. Wolchin's counsel suggested there had been only water condensation that later dried, and "maybe the sale [to] Sonic Circus was as-is." The court responded, "Wait a minute. I haven't heard any expert testify that condensation in sensitive microphones dries out with [*sic*] any damage to the microphones." The court also expressed concern that no information had been presented as to the value of the equipment Wolchin and Kaplan bought back from the insurance company. The court said, "There's a big difference between junk that was worthless and equipment that could be repaired or equipment that is as good as

new." The trial was continued to accommodate the court's and attorneys' schedules.

Trial resumed on June 23, 2017. The court and parties began the day with a discussion clarifying their positions and discussing the evidence. The court and parties agreed that the sale of equipment to Sonic Circus in 2007 totaled $656,000, as shown in exhibit 11, but not all of the equipment sold had belonged to Studio II, and not all of Studio II's equipment had been sold.[8] The court expressed concern about the state of the evidence: "[I]t seems to me Mr. Wolchin failed to, either, obtain an inventory or track the inventory as to what happened to the equipment at Indigo Ranch. So . . . how am I supposed to determine what among the remaining items of equipment came from Studio [II?]"

The court asked if anyone had prepared "a final list of what you say went up to Indigo Ranch." Wolchin's counsel stated that this information was not contained in a single list: "You would have to look at exhibit 2, 3, 4, and exhibit 109 to get it all together." The court asked why a summary had not been prepared, and Wolchin's counsel responded, "We don't have such a list. We, basically, took the position that you just do all this." The court asked, "How do you expect me to do it[?] You have thousands of pieces here of recording equipment. In a written list, I would have difficulty even deciphering" the claims. The court said it would need additional information before it could reach a decision in the case, and stated, "What I said from the

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[8] Wolchin's counsel argued at times that Kaplan received different amounts from the Sonic Circus sale. At this point, however, when the $656,000 figure was discussed, Wolchin's counsel agreed, "That's what was received."

first day is this case is not prepared for trial yet. Still not prepared for trial." Wolchin's counsel said he would prepare a list.

The court also asked Wolchin's counsel if he had attempted to get any information from Sonic Circus about the state of repair of the equipment it purchased, or to ask why Sonic Circus chose not to buy certain equipment Kaplan had offered for sale. Wolchin's counsel said he had contacted Sonic Circus, but "they were uncooperative." The court stated, "[Y]ou are giving me an impossible task to write up an essay when I am not getting the information I need."

Counsel for the estate stated that Wolchin's share of the Sonic Circus sale totaled $24,925, and that $12,000 had already been paid to him. (The exhibit counsel cited in support of this amount, exhibit 25A, is not in the record on appeal, although the $12,000 payment is discussed in the following section.) The court expressed surprise at the vast difference between the parties' damages assessments. The trial proceeded with the defense case.

C. Estate case

The estate called witness Bart Johnson.[9] He testified that he worked for Kaplan from 1975 to 1985, and occasionally thereafter. Kaplan collected vintage recording equipment, and by 1981 "his collection was the best in the world." Bart Johnson testified that the first 15 and a half pages of exhibit 11 showed equipment that was not sold to Sonic Circus, and the items were listed as non-received.

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[9] The record also refers to him as Bartley Johnson. He was called out of order before Wolchin rested. We refer to him and witness Chuck Johnson by their full names to avoid confusion.

Bart Johnson said he last visited Studio II in 1988 or 1989. After Kaplan's death, Bart Johnson searched the collection of equipment at the Kaplans' home to assist Wolchin in determining if any equipment from the 1985 Studio II inventory list remained at the home. Exhibit 10 is the list of equipment Johnson found; some equipment includes a notation that it was found in a "repair" box. Certain items on the list correlated to the 1985 inventory of Studio II equipment.

The estate called witness Christopher Brunt, who had prepared exhibit 109 (the repair report and Greenspan list) for the insurance company. Brunt testified that he began working with Kaplan in the mid-1970's. Brunt performed maintenance on recording equipment at Studio II during the years it was in operation.

After the flood, Kaplan asked Brunt to go to Studio II to examine the equipment. Brunt testified, "The damage was massive. It was devastating. All of the major pieces of equipment had suffered tremendous damage. It wasn't just water. It was very dirty, greasy chemically infused water." He continued, "Everything, without exception, was covered in this greasy, dirty filth." Brunt thought "there was some corrosive element in the water." He said that "all of the major equipment was damaged; that is, the mixing board, the tape machines, the [studio] monitors, and the microphones were all damaged to a point where it would have been impossible to carry on business." He also testified that some of the microphones were "damaged beyond repair by whatever chemical or moisture . . . they had been exposed to. [¶] And without exception, all of the rare microphones were damaged in some way. Some were total losses; some were probably repairable." Brunt testified about the report

included in exhibit 109, assessing the equipment damage for the insurance company. He also stated that he wrote a separate report regarding the microphones that were damaged in the flood, but he did not know where that report was now.

On cross-examination, Brunt testified that all of the equipment in Studio II was damaged in the flood, and "[s]ome of it was repairable; some of it was not." He testified that the damaged equipment would not have been usable without repairs. Wolchin's counsel asked, "And that goes for everything on the Greenspan list, correct?" Brunt answered, "Yeah." Wolchin's counsel asked if vintage recording equipment gets more valuable as time passes, and Brunt said, "Not necessarily, no." Brunt did not know what happened to any of the equipment from Studio II after it closed.

The defense called Julie Kaplan to testify. She stated that she did some office work and bookkeeping for Indigo Ranch in 1991. Julie recalled the sale of equipment to Sonic Circus in 2006 and 2007, and agreed that the sale price listed in exhibit 11—"about $600,000"—was accurate. Julie testified that in 2008, Kaplan instructed her to pay Wolchin from the proceeds of the Sonic Circus sale. She said she and Kaplan paid Wolchin $12,000 in two payments (one payment of $6,500 and one payment of $5,500) in 2008. She discussed exhibit 103, a withdrawal slip dated September 4, 2008. It showed a withdrawal of $7,000 from the Kaplans' personal bank account, with a handwritten note that stated, "Money paid to Jason Wolchin owed so far $6500.00." Julie testified that after completing the withdrawal, she purchased a cashier's check for $6,500.00 on September 4, 2008, and mailed it to Wolchin at his business. Julie testified that the cashier's check was "[p]ayment for equipment."

Julie also testified about exhibit 104, a copy of an October 24, 2008 cashier's check from Julie and Richard Kaplan to Jason Wolchin for $5,500. Julie testified that she also mailed this cashier's check to Wolchin "because we owed him money" for "equipment." Copies of two envelopes addressed to Wolchin in Julie's handwriting were admitted as exhibit 17. The defense rested.

D. Wolchin's rebuttal

Wolchin recalled witness Chuck Johnson in rebuttal. He testified that he had been involved in moving the equipment from Studio II to Indigo Ranch after the flood, but "I can't say where that gear ended up." He said some of the Studio II equipment was used at Indigo Ranch thereafter. He testified about a photograph from 1998, which showed "the outboard gear at Indigo, and the Indigo control room. And I see a mixture of Indigo gear and some Studio II gear as well." (We discuss this testimony in further detail below.) When asked if the Studio II gear was usable, Chuck Johnson said the pieces of equipment in the photo were "all usable." Chuck Johnson testified that he did not know if the equipment had since been sold or destroyed.

Wolchin testified on rebuttal that records were kept regarding the equipment at Studio II and its depreciation, but the records had been "moved up to Indigo Ranch" and he did not know where they were. Wolchin also stated that he never received the payments Julie testified were sent to him. The parties rested.

After the close of evidence, the court said, "This case was not well prepared for trial. It's not well prepared now. Because I can't make judgments as to this collection of equipment. You haven't done the basic work." The court stated, "What we do

know, and for Pete's sake focus on this. You have a fully functioning recording studio . . ., it was flooded. Most of the equipment was damaged. You sent it to the insurance company. How much did they pay?" Counsel for the estate responded, "No one knows." The court stated, "Isn't that amazing? No one knows." The court asked, "How much did Kaplan and Wolchin pay to buy it back?" Again the estate's counsel stated, "No one knows." The court also said, "I guess I can't make a statement of decision for the [equipment] that is still up at [the] Kaplan residence because I don't know what it is. And I don't know what the origin of it is. And that's because this matter is not ready for trial."

The court and parties discussed whether Wolchin had met his burden to prove his case. Wolchin's counsel offered to submit additional documents, and the court stated, "The case is over folks. And I don't have any basic facts to write a statement of decision. . . . [T]he question we asked is, have you proved a case? You've rested your case. I don't have any tabulations except for the Sonic Circus sale." The court also noted that Wolchin "can't even tell me the basic facts, like how much did they pay the insurance company to buy this equipment." The court continued, "I know that most of it was damaged. So . . . some of it could be rehabilitated. I can't talk about a thousand pieces [of equipment] in a general statement like that." A hearing was set for the following week to complete closing arguments.

Before closing arguments, on June 27, 2017, Wolchin lodged exhibit 43, which he called a "baseline Studio II inventory," with a total claim for damages of $316,881.

E. Closing arguments

At a hearing on June 29, 2017, Wolchin's counsel argued in closing that not everything in Studio II had been damaged in the flood. He pointed to the 1985 inventory, the 1987 Mix magazine listing, and the undated equipment list (which counsel said was from 1989) as evidence of additional, undamaged equipment that had been at Studio II. The court stated, "I don't know whether the equipment was there in '93. That is my problem. . . ." Wolchin's counsel noted that serial numbers were listed for the equipment in the 1985 inventory, and suggested this equipment could be traced.

Wolchin's counsel also argued that if Kaplan sent equipment from Indigo Ranch to Studio II, then Kaplan should have maintained some sort of documentation; without that, "[b]laming Mr. Wolchin for everything is really inappropriate." The court said, "I'm not blaming him for anything. I'm only asking the question: Did plaintiff ever prove its case?" Wolchin's counsel stated that plaintiff "showed the inventory that existed three separate times" (in the 1985 inventory, the 1987 Mix magazine listing, and the undated equipment list), "and on a fourth time it appears as exhibit 109," the Greenspan inventory.

Wolchin's counsel also said that the Sonic Circus list, exhibit 11, "says [the Kaplans] got paid [$]656,000 for $400,000 worth of merchandise[;] that's is what it says very, very simple." Wolchin's counsel also asserted, "[Y]ou asked us to bring baseline and we have done that, that is exhibit number 43. It says very clearly you take 109 [the Greenspan list] you add it to the undisputed inventories or lists," which "gives you the baseline and that comes out to $316,000." The court asked about the items marked non-received on the Sonic Circus list, and

Wolchin's counsel responded, "As far as we are concerned all of it was sold to Sonic Circus. It no longer is in existence. We can't find it. It was either sold or they have it. One way or the other. I don't know." When the court asked about how much of the $316,000 in claimed damages consisted of unsold equipment, counsel said he did not know. Noting that plaintiff actually sought half of the Sonic Circus sale prices, the court asked, "So your claim in this case is $158,000; is that correct?" Wolchin's counsel answered, "Yes, that's right."

Wolchin's counsel also argued that the evidence regarding the checks purportedly paid to Wolchin was insufficient to prove that any payment was actually made. He pointed out that Wolchin testified that he never received any payment.

Counsel for the estate asserted in closing arguments that Wolchin's post-trial exhibit 43 contained multiple listings for the same items, and items for which ownership was disputed. Removing the duplicates and the disputed items, "the grand total comes to $97,695," half of which was $48,847.50. Subtracting the $12,000 Julie testified was sent to Wolchin, the total was $36,847.50. The estate's counsel continued, "However, I don't think that's the complete story." He stated that the one person who knew what happened to all the equipment was Kaplan, who was "no longer with us," which created "issues regarding piecing this story together."

The estate's counsel concluded that the "total undisputed Studio II property in the Greenspan inventory . . . totals $23,000." (Counsel referenced exhibit 116, which apparently contained the estate's edits to exhibit 43. It is not in the record on appeal, thus it is unclear how defense counsel reached this figure.) The estate's counsel noted that half of this total would be

$11,500, and the 2008 payments totaling $12,000 were "almost right on the money."

F. Court's tentative ruling

The court issued a tentative ruling on July 10, 2017. It noted that the Greenspan list showed that in 1993 after the flood, "Studio II made a claim for $22,720 for equipment/damage depreciation and a further claim for $91,399 for the cost to repair the remaining equipment."[10] The court stated that Kaplan and Wolchin then bought the damaged equipment from the insurer. Kaplan and Wolchin dissolved their corporation, and agreed in writing to "jointly dispose[ ] of any corporate assets after the liquidation of Studio II Recording Inc. The proceeds will be divided equally after the cost of disposition."

The court stated that "once Kaplan and Wolchin bought the equipment back from the insurer," they owned it and it was "subject to their July 22, 1993 written agreement" about distributing corporation assets. Thus, the court found that "the Greenspan inventory is the only list of equipment that will support Wolchin's claim to having an ownership interest in the equipment that Indigo Ranch sold in 2007 to Sonic Circus."

The court stated that Kaplan "made a bulk sale of a large quantity of recording equipment (hundreds of items, see Exh. 11) to Sonic Circus, in about May, 2007, receiving $656,000 for the equipment." The court found that in fall 2008, Kaplan sent Wolchin two cashier's checks totaling $12,000. The court found

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[10] It is unclear how the court arrived at the figure of $22,720 as the amount of the claim to the insurance company. It is possible that the court totaled some of the loss amounts in the Greenspan list. The court's finding as to the cost of repair reflects the amount in Brunt's report.

that "the Studio II equipment that was included in the bulk sale to Sonic Circus obtained a sale price of $86,699."[11]

The court continued, "However, before 50 percent of that amount may be allocated to Wolchin, an adjustment must be made for the repair costs that Kaplan absorbed in restoring the equipment to usability." The court noted that the repair cost in Brunt's report was estimated to be $91,399. "If the repair cost is spread over all of the Studio II equipment, the net value of the equipment is negative ($86,699 minus $91,399)." The court noted that the "Studio II equipment was not in saleable condition" after the flood in 1993. The court held that "plaintiff has not proved, once a reasonable offset is applied for the costs of restoring the performance of the Studio II equipment, that its sale value exceeded the $12,000 that Kaplan paid to Wolchin" in 2008.

The court stated that it would enter judgment for the estate on Wolchin's breach of contract cause of action because Wolchin "has not proved any damages based on the alleged breach of the July 22, 1993 written agreement once the reasonable repair costs itemized in the Brunt report are applied." The court stated that Wolchin "may be entitled to judgment on the accounting cause of action" for equipment remaining at the Kaplan residence. The court also held, "The third cause of action for money had and received [is] subsumed within the court's ruling on the contract cause of action. [¶] Plaintiff did not prove any fraud on Kaplan's

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[11]The trial court referenced exhibit 115 in support of this amount. Exhibit 115 is not included in the record on appeal, so it is not entirely clear how the trial court reached this figure. As Wolchin has not challenged this finding (subject to the adjustment in the final statement of decision), we accept it as accurate.

part, and, therefore, the court shall enter judgment for defendant on the fourth cause of action."

Wolchin filed a written objection to the court's tentative ruling. He asserted that the court "improperly applied two offsets" to reduce his damages—the $12,000 payments and costs of repair—"which are unsupported by the evidence at trial." Wolchin also asserted that he had proved damages on the cause of action for money had and received.

G. August 23 and September 29 hearings

The court held a hearing on August 23, 2017, "to settle the statement of decision and judgment." Wolchin argued that his recovery should not be limited to the Greenspan list, because some equipment on the 1985 Studio II inventory list, which included serial numbers, was also included in the Sonic Circus sale, and therefore the sale of those items should be included in the judgment. The court invited counsel to make a list of equipment from the "Greenspan list, plus serial numbered items that appear on exhibit 11," the Sonic Circus sale list.

Wolchin's counsel also asserted that "there was no evidence, none, nada, in this record that anybody did any repair to the equipment after it had been exposed to water." He argued that the estate had the burden of proof to establish any offset from the damages, and it had not done so. The court disagreed, stating, "They don't need an affirmative defense on this issue. The issue is what is the value of this equipment." The court noted that the Sonic Circus sale occurred "years after the water damage" and that Brunt had testified that "contact points were oxidized." The court continued, "[N]o evidence was offered as to what it would cost in . . . Kaplan's time to fix it up. I think your argument is we ignore that because there is no evidence, and I

don't know whether that's a fair result or not." Wolchin's counsel argued that valuing the equipment was easy: "It's what Sonic Circus is willing to pay for it. In whatever condition it was in, that's the value." Wolchin also asserted that the evidence was insufficient to show that Kaplain paid him $12,000.

The estate asserted that the cost of repair for the console was well documented, and "the estate is absolutely entitled to the offset of $91,399 with regard to the console." The estate acknowledged that there was no evidence of repair costs for equipment other than the console, "but there was testimony as to the fact that all of the equipment was damaged and it all needed to be worked on in order to get it to usable condition and saleable condition."

The court stated, "We have no record of whether the parts were sold usable, and, if they were, what the cost was to repair them in terms of time and components. That information was available from Sonic Circus, but no one thought the need to provide it to me." Wolchin's counsel asserted, "Sonic Circus was willing to pay this, and they did. Whether it was repaired or not makes no difference." The court stated that it disagreed, and "the record is not complete." After a continued discussion on trying to track the equipment and its value, court stated, "This was a terrible trial, folks, and I think you both understand that now."

The court stated that Sonic Circus might have information about why the equipment on the first 15 and a half pages of exhibit 11 was not purchased. Wolchin's counsel said he would attempt to contact Sonic Circus to find out more. The court said, "No. The trial is over. At this point I'm not opening it for new evidence." Wolchin's counsel asked if he could make a formal

request to reopen the evidence for a limited purpose, and the court said no.

Wolchin filed his revised inventory/damages claim, exhibit 44, on August 30, 2017, seeking damages of $153,306. He filed a third version, exhibit 45, on September 18, 2017, seeking damages of $149,806.

The court held another hearing on September 29, after the parties had inspected equipment at the Kaplan residence to determine the value of that equipment and to see if some equipment was still missing. At the hearing, the court and counsel again discussed how to determine Wolchin's alleged damages. It became clear that at this late post-trial date, no one knew whether Indigo Ranch or Sonic Circus had prepared exhibit 11. Wolchin's counsel asked the court to address the issue of missing equipment, because "[i]f it wasn't sold, they had custody of it, they need to account for it." The court and parties discussed that the equipment was moved to Indigo Ranch after the Studio II flood, and some of it was used there for other projects. The court asked, "Why has Kaplan become individually liable? Why isn't Indigo Ranch liable?" Wolchin's counsel stated that "Indigo Ranch has nothing to do with anything here in this case at all." The court confirmed that the equipment was "delivered to Indigo Ranch," "held by Indigo Ranch for ten years," and "used by Indigo Ranch." The court asked, "If Indigo Ranch sold some of that property and didn't tell Wolchin about it, that would be a liability of Indigo Ranch, not a liability of Kaplan?" Wolchin's counsel stated that Kaplan "took control" of the equipment, "and the parties have an agreement that they're going to split the profits and they're going to take out the costs. And that was the parties['] understanding in writing and it's gone." The court

questioned whether Indigo Ranch converted the property to its own ownership, and stated, "There's no evidence to the contrary." Wolchin's counsel asserted that the equipment was moved to Indigo Ranch only for storage, and "the testimony in the record was that at some future date, the property was going to be sold."

H. Final decision

The court issued a final statement of decision on October 16, 2017. It stated that the tentative decision was unchanged, aside from the following. The court noted that equipment owned by Studio II "was moved to Indigo Ranch when Studio II closed in 1993. Indigo Ranch, an incorporated entity wholly owned by Richard Kaplan, itself closed in 2006/2007 at which time most of its recording assets were sold off. The recording equipment that Indigo Ranch did not sell was retained by Kaplan."

The court also stated, "Plaintiff's greater claim remains unproven. Wolchin was to receive, under the parties' written agreement, one half of the sale proceeds less the 'costs of sale.' Such 'costs of sale' include a fair reimbursement for the labor and other expense that was needed to repair the water-damaged equipment so that it could be sold as usable equipment. Plaintiff did not introduce evidence at trial nor suggest in its post-trial briefs a methodology to estimate the repair costs for the equipment that Kaplan sold to Sonic Circus. Plaintiff had the burden to produce evidence to establish such costs of sale and, having failed to do so, is not entitled to a money judgment against the Kaplan Estate." As for the missing equipment, the court held that "Plaintiff does not establish a claim. . . . Such equipment was delivered into the possession of and was used in the business of Indigo Ranch. As Indigo Ranch was a

corporation, plaintiff's claim should have been directed against Indigo Ranch."

The court adjusted its finding as to the value of the Studio II equipment sold to Sonic Circus. It stated that the 1985 inventory (which included serial numbers) and the Greenspan inventory established what Studio II owned, and cross-referencing those exhibits with the Sonic Circus sale list, "the equipment in which plaintiff has an interest has a value of $94,260." However, "plaintiff is not entitled to a judgment finding either liability or damages in his favor, given plaintiff's failure to produce any evidence that the proceeds from the sale of recording equipment to Sonic Circus, less the $12,000 that Kaplan paid Wolchin, exceeds the cost of sales for the Studio II equipment that was sold to Sonic Circus."

The court further stated that some of the equipment damaged in the Studio II flood "was put into use at Indigo Ranch, showing that it had been repaired. The need to repair the equipment decreased its value: that is the premise of Studio II's insurance claim that is documented in Exhibit 109." The court noted that Wolchin used the prices on the Sonic Circus sale list as evidence of the value of the equipment. The court stated, "Plaintiff assumes that Kaplan was able to obtain the Exhibit 11 sale price for individual equipment pieces without incurring any time or cost to repair the equipment to make it saleable. That assumption is not tenable because the evidence shows that the repair costs were required to make the equipment serviceable and thus saleable." The court also stated, "Plaintiff offers no methodology nor calculation to determine the expense that was incurred to restore the water damaged equipment to usability. Plaintiff's damage evidence, therefore, is not complete and cannot

be relied upon to provide a damage amount with reasonable certainty."

The court entered judgment in favor of the estate on the causes of action for breach of contract, money had and received, and fraud. For the cause of action for accounting, the court stated that the parties had reached a tentative agreement regarding the equipment remaining in the estate's control, and the court would retain jurisdiction to enforce that agreement. Wolchin timely appealed.

DISCUSSION

Wolchin asserts three bases for error. First, he contends the trial court erred by finding in favor of the estate on his breach of contract cause of action. As part of this argument, Wolchin asserts that the court erred by finding that he failed to adequately prove damages. Second, Wolchin asserts that the evidence was insufficient to support the trial court's finding that the Kaplans paid him two payments totaling $12,000 in 2008. Third, he contends the trial court erred in finding that any claim Wolchin had for missing equipment should have been brought against Indigo Ranch rather than Kaplan's estate. We consider each of these arguments.

In reviewing a judgment based upon a statement of decision following a bench trial, we typically apply a substantial evidence standard of review to the trial court's findings of fact. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) However, when "the trier of fact has expressly or implicitly concluded that the party with the burden of proof failed to carry that burden and that party appeals, the substantial evidence test does not apply. Instead, 'the question for a reviewing court becomes whether the evidence compels a finding in favor of the

appellant as a matter of law.' [Citation.] "'Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.'"'" (*Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 302-303.)[12]

A. Breach of contract

Wolchin asserts that he "proved all elements of a cause of action for breach of contract, yet the trial court entered judgment for" the estate. He contends that "[b]ased on the trial court's finding that [Wolchin] had an interest in $94,260 worth of equipment sold by Kaplan to Sonic Circus, [Wolchin] should have been awarded at least $47,130, less any proper offset." He characterizes the court's finding of repair costs to be an "unproven, illegitimate offset[ ]," which the court applied "despite the fact that [the estate] did not even seek an offset for estimated repair costs" or "introduce evidence to support such a deduction."

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." (Civ. Code, § 3301.)

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[12]Neither party acknowledges this standard of review in their briefs; instead, they assert that the substantial evidence standard of review applies. Even if that standard were applicable, substantial evidence supports the court's findings and therefore our holding would remain the same.

The contract at issue is the parties' written agreement from July 22, 1993, which states in full, "It is agreed between Richard Kaplan and Jason Wolchin they will jointly dispose of any corporate assets after the liquidation of Studio II Recording Inc. The proceeds will be divided equally after the cost of disposition." There is no dispute that for purposes of this case, the "corporate assets" consisted of the recording equipment owned by Studio II. There is also no dispute that at least some of the equipment was damaged in the flood, and was listed on the Greenspan inventory. The court also found that some additional equipment, identifiable by serial number on the 1985 inventory, also constituted Studio II corporate assets. The parties do not challenge this finding.

Thus, there appears to be no dispute that as of July 1993, when the partners elected to wind down the corporation, Wolchin was entitled to half of the value of Studio II's equipment. However, no evidence was presented regarding the value of the equipment in 1993. Wolchin testified that he and Kaplan received an insurance payment for the damaged equipment, and they used some of that payment to purchase the damaged equipment from the insurance company. He did not present any evidence regarding the amount the insurance company paid, or the amount he and Kaplan paid to re-purchase the equipment. At trial, Wolchin testified that Kaplan largely handled the insurance claim, and Wolchin could not remember the details of these transactions.

Following the flood, the equipment was moved to Indigo Ranch. Kaplan remained active in the recording industry, and Wolchin moved on to other endeavors. There is very little evidence of what happened to most of this equipment from 1993 to 2007. Wolchin asserts, in essence, that the court should have

assumed that the equipment was kept in storage, unrepaired and unused, and simply increased in value due to the passage of time until some of it was sold in 2007.

However, the evidence supports the inference that at least some of the equipment was repaired. Brunt testified that all of the equipment in Studio II was damaged in the flood, and none of it would have been usable without repairs. Wolchin's counsel asked, "And that goes for everything on the Greenspan list, correct?" Brunt answered, "Yeah." However, Wolchin testified that Kaplan told him that Studio II equipment was being used at Indigo Ranch after 1993. Chuck Johnson also testified that he used equipment from Studio II at Indigo Ranch after the flood. Although the parties at trial made no effort to connect Chuck Johnson's testimony to items on the Greenspan list, it appears that some of the equipment he referenced was listed as damaged in 1993. For example, in discussing a photo of equipment being used at Indigo Ranch, Chuck Johnson said he recognized "the Publison, which . . . was Studio II's gear." The Greenspan list included a "Publison Infernal Machine." Chuck Johnson also referenced "the LA1178, which is a stereo limiter, which Indigo didn't have." The Greenspan list included a Urei 1178. Chuck Johnson pointed out a Teletronix limiter in the photo, stating, "The LA-one was Studio II's. Indigo didn't have an LA-one." The 1985 inventory lists two "Teletronix Leveling Amp/Limiter," one model "LA1" and one model "LA2." The Greenspan list includes "2 Teletronix limiters" on a single line. Chuck Johnson also noted, "These Urie's [*sic*] 175's, those were Studio II." The Greenspan list notes one "Urei 175 tube limiter."[13] When

[13] The cross-referencing of this testimony with the Greenspan list may be incorrect; no witness testified that these

Wolchin's counsel asked if this equipment was all usable, Chuck Johnson replied, "All usable. I used it all."

Other items on the Greenspan list apparently increased significantly in value from 1993 to 2007. For example, Brunt stated in his damage report, "Upon opening a rare tube microphone (Telefunken 251) the inside was moist and smelled of mold formation. These microphones had been maintained in a state of meticulous cleanliness." The Telefunken 251 was listed as a total loss on page 6 of the Greenspan list in 1993. According to the 2007 Sonic Circus list, Sonic Circus purchased a "Telefunken ELAM-251 (vintage) tube mic system" for $13,500. Similarly, the custom Aengus mixing console Brunt described as severely damaged did not have any value amount listed on the Greenspan report. According to the Sonic Circus list, in 2007 Sonic Circus bought an API/Aengus-Jensen recording console for $8,000. Two other entries on the Sonic Circus list show "API/Aengus-Jensen 1608 console (frames + modules in boxes)" for $4,000 each.[14]

There was no evidence presented as to whether the Telefunken 251 microphone or Aengus console were repaired, or

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were the same pieces of equipment. But this simply highlights an overarching problem in this case: The parties did very little to convert complicated raw data about hundreds of pieces of specialized equipment into evidence reasonably useful to the trier of fact. Throughout the trial, the court stated several times that the case was not adequately prepared.

[14]Wolchin states in his opening brief that "Sonic paid . . . $16,000 for the mixing console." The court also stated this in its tentative ruling. Neither the parties nor the court have explained how this figure was reached, and no single entry on the Sonic Circus sale list is for $16,000.

if their value increased simply by the passage of time. However, Brunt's testimony that none of the Studio II equipment was usable after the flood without repairs, along with Wolchin and Johnson's testimony that Studio II equipment was indeed put into use after the flood, which apparently included equipment listed as damaged on the Greenspan list, supported the inference that at least some of the damaged equipment was repaired and returned to a state of usability after the flood at Studio II.

Citing Chuck Johnson's testimony (but not specifying any particular equipment), Wolchin acknowledges there was "uncontroverted evidence that a lot of the equipment marked as damaged on the Greenspan inventory was actually used later at Indigo Ranch." However, he asserts that there was "no reason for the trial court to assume anything about any repairs or restoration which may or may not have been required" before the equipment was sold to Sonic Circus, and there was "no evidentiary basis for the trial court to make any such assumptions." Wolchin characterizes the court's cost-of-repair reasoning as imposing an "offset" that "was not even claimed or sought" by the estate.

The court did not find that Wolchin was entitled to damages, minus an offset proven by the estate. Rather, the court found that Wolchin failed to "produce any evidence that the proceeds from the sale of recording equipment to Sonic Circus . . . exceeds the cost of sales for the Studio II equipment that was sold to Sonic Circus."[15] The court focused on the portion of the parties'

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[15]Wolchin also incorrectly asserts that the court "specifically found that [Wolchin] had a 50% interest in $94,260 worth of equipment." As we interpret it, the court's statement that "the equipment in which plaintiff has an interest ha[d] a

agreement stating that the corporation's assets "will be divided equally after the cost of disposition." Wolchin presented no evidence about the costs of disposition, and the evidence allowed for the inference that such costs must have been incurred. For example, the equipment was moved to Indigo Ranch; after Indigo Ranch closed, it was moved to the Kaplan residence. After 1993, Kaplan either stored the Studio II equipment for 14 years, or he repaired it to a state of usability and incurred the cost of maintaining it. Before the sale to Sonic Circus in 2007, Kaplan or someone else presumably sorted the equipment, assessed it, and prepared an inventory or otherwise prepared the equipment for sale. The sale with Sonic Circus was negotiated and executed. The remaining unsold items remained stored with the Kaplans for the next seven years until Kaplan's death. Costs—in money, time, or both—are necessarily incurred in such actions.

Yet no evidence was presented regarding the costs incurred. This failure of proof was not an "offset" from the damages Wolchin was otherwise entitled to collect. Rather, it was Wolchin's failure to prove the "proceeds . . . after the cost of disposition" that he was entitled to under the contract. ""Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery.'" [Citation.] The plaintiff in a breach of contract action has the burden of proving nonspeculative damages with reasonable certainty." (*Copenbarger v. Morris Cerullo World Evangelism, Inc*. (2018) 29

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value of $94,260" when it was sold in 2007 is not tantamount to a statement that Wolchin was entitled to half of that value. Indeed, the court specifically held that Wolchin was *not* entitled to a 50 percent interest in the 2007 sale price, for the reasons discussed herein.

Cal.App.5th 1, 11.) Wolchin did not meet that burden here. The trial court's findings are supported by evidence, and we will not second-guess the inferences the trial court drew. (See, e.g., *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334 ["'questions as to the weight and sufficiency of the evidence [and] the inferences to be drawn therefrom . . . are matters for the trial court to resolve'"].)

Wolchin also asserts that the trial court undervalued the equipment sold to Sonic Circus. Apparently relying on exhibit 43, his first post-trial exhibit stating his alleged damages, Wolchin contends he "proved that Studio II equipment included in the Greenspan inventory was sold to Sonic [Circus] for the aggregate price of $124,661." Wolchin further asserts that based on the 1985 inventory and the lists of additional equipment in exhibits 3 and 4, he proved that additional items "were sold to Sonic [Circus] for the aggregate additional price of $192,220 . . . for a grand total of $316,881." He also references the first 15 and a half pages of the Sonic Circus list, which show items as "nonreceived," and argues that the trial court erred by finding that these items were not sold to Sonic Circus. Wolchin reasons that because the total price of the Sonic Circus items was listed as $480,336 on exhibit 11, but Sonic Circus actually paid the Kaplans $656,000, "the only reasonable inference is that Sonic [Circus] actually received an additional $200,000 worth of equipment." Wolchin asserts that he is therefore entitled to increased damages.

But simply highlighting gaps in the evidence—and in this case, the evidentiary gaps are considerable—does not entitle Wolchin to damages. The discrepancy between the value of the items on the Sonic Circus list and the payments to the Kaplans

was never explained at trial. Wolchin did not present any evidence from Sonic Circus directly, or otherwise attempt to reconcile these figures. He is not entitled to receive half of the Sonic Circus payments simply because he cannot explain the total.

Thus, we find no error in the court's finding that Wolchin failed to establish damages consisting of the "proceeds [to] be divided equally after the cost of disposition," as provided for in the parties' contract. Wolchin has not demonstrated on appeal that he was entitled to a judgment in his favor as a matter of law.[16]

B. The Kaplans' $12,000 payment to Wolchin

Wolchin also asserts that the trial court erred by finding that Kaplan paid him $12,000 in 2008 because that fact was "not supported by competent, admissible evidence." He acknowledges that Julie testified she mailed two cashier's checks to Wolchin, one for $5,500 and one for $6,500. However, he asserts that the evidence supporting Julie's testimony—the withdrawal slip and copy of the front of one cashier's check—was erroneously admitted. Wolchin also argues that Julie's testimony was "unsupported" and "squarely contradicted by [Wolchin's] testimony that he never received either check."

Julie testified that on September 4, 2008, she withdrew $7,000 from the Kaplans' personal bank account, and she used $6,500 of that money to purchase a cashier's check. She testified that she mailed the cashier's check to Wolchin at his business

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[16] Wolchin also asserts that he is entitled to prejudgment interest on his damages. As we affirm the trial court's ruling that Wolchin did not prove his entitlement to damages, this argument is moot.

address. She also testified that on October 24, 2008, she and Kaplan together purchased a cashier's check for $5,500. She testified that she also mailed this check to Wolchin at his business address. The court specifically found that Julie's testimony on this issue was credible, and it believed Julie rather than Wolchin. This evidence was sufficient to support the court's finding that the Kaplans paid Wolchin $12,000 in 2008. On appeal, "[i]t is not our role as a reviewing court to reweigh the evidence or to assess witness credibility." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.)

Wolchin, however, asserts that the evidence was not sufficient to support the court's finding. He contends that the trial court erred by admitting exhibit 103, the withdrawal slip with Julie's handwriting on it, and exhibit 104, a copy of the cashier's check for $5,500. Even if we were to assume for the sake of argument that admission of these documents was error, it would not warrant a reversal. "'Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.'" (*Kim v. The True Church Members of Holy Hill Community Church* (2015) 236 Cal.App.4th 1435, 1449.) "A party challenging a trial court's evidentiary rulings must demonstrate both an abuse of discretion and a consequent miscarriage of justice. (*Ibid.*) '"'[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'"'" (*San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1301-1302.)

Julie's testimony alone was sufficient to support the court's finding, and Wolchin has not met his burden to show on appeal that based on the evidence presented, he was entitled to a finding in his favor as a matter of law. Thus, no error in the admission of exhibits 103 or 104 warrants reversal.

C. Missing equipment

Not all of the equipment on the Greenspan list was included in the Sonic Circus list, and some of it apparently could not be located at the Kaplan residence. Regarding this equipment, the court stated in its final ruling, "[Wolchin] does not establish a claim against the Kaplan Estate for the recording equipment that was not sold to Sonic Circus and was not retained by Indigo Ranch. Such equipment was delivered into the possession of and was used in the business of Indigo Ranch. As Indigo Ranch was a corporation, [Wolchin's] claim should have been directed against Indigo Ranch."

Wolchin asserts on appeal that the trial court was incorrect because the fact that Kaplan, Wolchin's partner and co-owner of Studio II, "stored the equipment at Indigo Ranch (and later, at his residence) did not somehow transmute said equipment into property of Indigo Ranch. Thus, there was no basis for the trial court to find that this portion of the claim should have been directed against Indigo Ranch." Noting that some items have never been accounted for (but not citing any evidence or references as to which items), Wolchin asks in his opening brief, "[I]f those items were not sold to Sonic [Circus], and are not remaining at the Kaplan residence, what happened to them? Where are they? As this is an accounting case, those items must be accounted for by [the estate] one way or the other."

"A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting. . . . [¶] An action for accounting is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.)

Like evidence for breach of contract, the evidence presented for an accounting does not compel a finding in Wolchin's favor as a matter of law. Wolchin states that certain equipment is missing, but he does not say which items from the Greenspan list are unaccounted for. He did not question any witnesses about what might have happened to these items after 1993. Questions about the missing equipment arose at the post-trial hearing on August 23, and the court stated, "I guess Mr. Wolchin wants some sort of value assigned to it, but no value was proved." Wolchin's counsel stated, "It's a cause of action for accounting. We want to know what they did with it so we could at least figure out where it is and what it is worth." The court responded, "I'm sorry. The trial is over. You present the evidence for the accounting at trial. I'm not going to do it in the future."

As with the other aspects of this case, Wolchin points to the dearth of evidence about the location of this equipment, and argues that the lack of information entitles him to damages. This position is not supported by law or the evidence presented.

Moreover, the evidence does not support Wolchin's position. He argues that "the Studio II equipment went to Kaplan, who took possession and held the equipment in trust at Indigo Ranch—i.e. the equipment was just stored at Indigo Ranch

pending its ultimate sale or other disposition." However, as the estate points out, the evidence showed that the Studio II equipment was moved to Indigo Ranch (not into Kaplan's personal possession), and some of it was used for recording at Indigo Ranch after 1993. Some of it was sold, and more of it was offered for sale after Indigo Ranch closed in 2006 or 2007. Thus, to the extent that there was evidence before the court that certain Studio II equipment was "missing" (which is not apparent from the evidence in the record on appeal), the court's conclusion that it was transferred to the possession of Indigo Ranch, rather than to Kaplan personally, is supported by evidence.

Even if we were to assume arguendo that Wolchin is correct and the trial court erred in attributing the missing equipment to Indigo Ranch rather than Kaplan personally, Wolchin has not established any prejudice resulting from the error, because he did not establish that he is entitled to recovery on his accounting cause of action in general. In short, Wolchin has not carried his burden on appeal, because he has not established that "'the evidence compels a finding in favor of the appellant as a matter of law.'" (*Petitpas v. Ford Motor Co., supra,* 13 Cal.App.5th at p. 302.)

DISPOSITION

The judgment is affirmed. The estate is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.